Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-333

KENNETH E. NORTH,
Appellant,

vs.

PATRICIA ANNE SANTEE,
Formerly PATRICIA ANNE NORTH,
Appellee,

APPEAL FROM THE SUPREME COURT OF KANSAS
KANSAS SUPREME COURT CASE NO. 47701

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MOTION TO DISMISS

This is a motion to dismiss the appeal from the State Court on two grounds: (1) that the alleged federal question sought to be reviewed was not expressly passed on by the Kansas Supreme Court and the judgment of that Court rests on an adequate non-federal basis, and (2) that the matter is moot.

1. The Alleged Federal Question Sought to be Reviewed By This Appeal Was Not Expressly Passed On by the Kansas Supreme Court and The Judgment of the Kansas Supreme Court Rests on an Adequate Non-Federal Basis.

To substantiate jurisdiction for an appeal under the provisions of 28 U.S.C. §1257(2), the appellant is required to show that the final judgment of the Supreme Court of Kansas drew into question the validity of the Kansas divorce grounds statute of incompatibility, on the ground of its being repugnant to the Constitution of the United States, and that the final judgment was in favor of the validity of that divorce ground statute. The case, North v. North, 213 Kan. 217, 535 P.2d 914 (1975), simply and unequivocally did not draw in question the validity of the Kansas divorce grounds statute as being repugnant to the Constitution of the United States, nor was there any decision made in favor of the validity of the statute. As the Kansas Supreme Court itself stated: "The issues raised by defendant (the alleged unconstitutionality of the divorce grounds statute of incompatibility) need not be resolved in this action." North v. North, supra, at 917.

The essential reasoning of appellant's argument in his appeal to the Kansas Supreme Court was that there was not substantial evidence to support the Trial Court's finding of in-

compatibility and that therefore the Trial Court had granted a divorce arbitrarily and capriciously, simply upon the demand of one party without evidence, and that this type of unilateral divorce was repugnant to certain federal constitutional principles. Appellant then went on to detail at great length all of the possible unconstitutional aspects of granting a unilateral divorce. The total flaw, however, in the reasoning of appellant was that there was indeed substantial evidence upon which to find incompatibility -- not unilateral incompatibility but a mutuality of incompatibility -- and therefore the Trial Court was not allowing a unilateral divorce and therefore all of the alleged unconstitutional aspects of a unilateral divorce were, however interesting in an academic sense, simply not applicable to this particular lawsuit.

The record on appeal showed one hundred and six separate elements of evidence of the incompatibility of the parties ranging from failure of the appellant to file income tax returns to sexual incompatibility throughout the entirety of the marriage. The evidence included written documents, appellant's own testimony, and the testimony of a qualified expert behavioral scientist. (Significantly enough, the appellant did not present any evidence at all in opposition to appellee's evidence that the parties were incompatible -- seven or eight witnesses and four or five documents -- except his own appearance on the stand.)

Needless to say, once the Kansas Supreme Court reviewed the overwhelming evidence of the incompatibility of the parties, it correctly concluded that there was no unilateral divorce granted by the Trial Court and, therefore, the allegations of the unconstitutionality of a divorce ground statute of incompatibility interpreted to allow unilateral divorce need not be considered by the Kansas Supreme Court. The Kansas divorce grounds statute of incompatibility was simply not brought into question with regard to the United States Constitution and there was no decision in favor of its constitutionality one way or the other. Once the Kansas Supreme Court found that there was substantial evidence to support a finding of mutuality of incompatibility of the parties, the Court did not need to go further with its decision and decide the academic issue of whether a unilateral divorce statute would be unconstitutional.

> "The balance of defendant's arguments focus upon the constitutionality and validity of the incompatibility statute. The premise on which each of these challenges is made is that the trial court granted what is referred to as a 'unilateral divorce.' Unilateral divorce, as it relates to incompatibility, denotes a divorce granted when only one of the parties is incompatible. (See Schulman, Incompatibility: A "New" Approach to the Dissolution of Marriage, 20 Kan. L.Rev. 227.) This premise is contrary to the evidence and the specific findings of the trial court. The court stated that the parties did not have common interests or goals and they argued and quarreled. There was evidence from both parties as to their differing

personalities and constant conflicts. Such evidence was not restricted solely to charges of plaintiff. Defendant himself testified as to their arguments and divergent interests. The only reasonable conclusion we can reach is that each party is incompatible with the other. This finding negates defendant's claim that there was a unilateral divorce. Defendant's contentions cannot be sustained since premise on which they are based is untrue. We do not imply that if the premise were true we would find merit in defendant's position. We are merely saying the issues raised by defendant need not be resolved in this action." North v. North, supra at 917.

2. The Matter is Moot.

The appellee changed jobs after her divorce and met a man for the first time working at her new employment whom she later married after the mandate had come down from the Kansas Supreme Court affirming the divorce granted by the Trial Court. As a practical matter, the issue of the viability of the parties" marriage is indeed moot.

WHEREFORE, appellee moves the Court to dismiss the appeal in that the federal question sought to be reviewed was not expressly passed on and the judgment rests on an adequate non-federal basis, and the matter is moot.

Respectfully submitted,

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